

The search for victims of enforced disappearance: how the human rights obligation to search can be successfully implemented

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The Search for Victims of Enforced Disappearance

How the human rights obligation to search can be successfully implemented

Information

The International Convention for the Protection of All Persons from Enforced Disappearance obliges contracting State Parties to search for disappeared persons. An investigation has to be conducted into the location and circumstances of their disappearance and, in the event of their death, their remains identified and returned to their family. In many places, this search proves difficult in practice, and often the political will and/or the technical means for such a search are lacking. In such cases, international urgent actions can support those affected in the search for disappeared persons.

State Parties are obliged to search for victims of enforced disappearance. The international community of states first explicitly formulated this obligation in the 2006 International Convention for the Protection of All Persons from Enforced Disappearance:

“Each State Party shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains.”
(Article 24 (3))¹

In addition, the Convention stipulates that State Parties shall undertake an investigation of each case of a disappeared person, even when there has been no formal complaint (Article 12). Moreover, under the Convention, State Parties agree to mutually cooperate and assist one another (Article 15).

In negotiating this Convention, the codification of State Party obligations to search for victims of enforced disappearance and clear commitments to the right to the truth were key demands from groups affected and human rights experts.² Although the previous Declaration on the Protection of All Persons from Enforced Disappearance (1992) was already an international instrument, it did not contain these points.

In addition, the following human rights conventions regulate the obligations of State Parties in cases of enforced disappearance:

- Article 33 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts regulates the search for the dead and missing persons.³

Enforced Disappearances

“is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”

International Convention for the Protection of All Persons from Enforced Disappearance, Article 2

- Article X of the Inter-American Convention on Forced Disappearance of Persons (1994), ratified by 15 countries in Latin America, regulates the right to judicial procedures to establish the whereabouts of a person deprived of freedom, while Article XII provides for a special protection for children and young people.

In many countries, children and young people, who are in any case often limited in the exercise of their rights, are victims of disappearance. They are either left behind without family members or are themselves victims of enforced disappearance. For example, during the Spanish Civil War and Franco's subsequent dictatorship (1936 – 1975), medical professionals and state employees stole over 30,000 children from their parents and gave them, in most cases, to families loyal to Franco's regime.⁴ In 2013, the UN Committee on Enforced Disappearances gave Spain the recommendation to expand the search for those disappeared children and young people, with the help of a national DNA database.⁵

Significant factors for successful search

Access to information on the disappeared persons and the circumstances of their enforced disappearance is a basic requirement in the search for them, and in clarifying past and present crimes. In Peru, for example, the government refuses to disclose information on cases of disappeared persons in order to protect the security of the state.⁶ In Spain, the Church impedes the clarification of cases of persons disappeared under the Franco dictatorship by refusing to grant access to its archives.⁷ In the current cases of enforced disappearances in Syria and Yemen, the civil wars make access to information impossible.

Moreover, in practice the following aspects are crucial in successful searches:

- Systematic approach: First, the events need to be analysed. Afterwards, a plan for the search has to be drafted. This plan also guides collecting, documenting and systematising the information required. A systematic procedure guarantees that the search adopts a multi-disciplinary approach and, at the same time, applies rigorous scientific criteria.
- Skilled search, also on site: The search has to be conducted by a qualified institution. This institution must act independently and be equipped with sufficient financial and technical resources. It must be capable of collecting usable material, also in the field, and evaluating it.
- Fast search: Time delays in conducting the search endanger the lives of disappeared persons.
- Strategic search: Apart from analysing the events, the socio-political context in which the person disappeared has to be documented. Who was controlling the corresponding region? Are there patterns repeated in other cases?

Involving family members in the search

Under Article 24 of the Convention, the victims of enforced disappearance not only include the disappeared persons, but any individual suffering harm as the direct result of an enforced disappearance, i. e. family members as well as friends. In addition, Article 24 stipulates that victims have the right to know the truth of the circumstances of the enforced disappearance and the results of the investigations (Article 24 (2)). The Convention also guarantees civil society organizations the right to play a part in clarifying the fate of disappeared persons (Article 24 (6)).

Civil society and family members not only have the right to participate in the search, but their cooperation and involvement in clarifying the cases are often essential since, as witnesses, they can provide valuable information about the disappeared person or identify the victim. In many cases, as in the armed conflicts in Syria or in Yemen, the search for a disappeared person is exclusively conducted by the family and grassroots organizations. The same is true in Nigeria, where over the last years military personnel⁸ or the Boko Haram group⁹ have abducted hundreds of people. However, the families need support from local, national or international organizations. In some circumstances, their expertise is the only key to a successful search.

State Parties obliged to cooperate

The search for disappeared persons is especially complicated if they were abducted in a third country or were victims of enforced disappearance outside their home country. Such cases occurred, for example, under Operation Condor in Latin America (from 1975 into the 1980s), as well as in the later Timor-Leste during its occupation by Indonesia (1976–1999).

Under Article 15, State Party signatories to the International Convention for the Protection of All Persons from Enforced Disappearance are to cooperate and mutually assist one another in searching for and clarifying the location of disappeared persons as well as supporting those affected. Such mutual assistance extends, for instance, to locating and releasing disappeared persons as well as – in the event of death – exhuming and identifying their remains, and returning them.

There are many examples of such interstate cooperation. In 2004, Indonesia and Timor-Leste set up a bilateral Commission on Truth and Friendship which also had the remit of investigating enforced disappearance before Timor-Leste's independence in 2002. Those affected and human rights organizations called for implementing the Truth Commission's recommendations and, in 2014, achieved the appointment of a team to search for children through the National Human Rights Commission of Indonesia as well as the establishment of an Ombudsperson for Human Rights and Justice in Timor-Leste.¹⁰ On the Western Balkans, Bosnia-Herzegovina, Croatia, Serbia and Montenegro have agreed between themselves to cooperate in the search for victims of enforced disappearance, and in exhuming and identifying human remains.

However, interstate cooperation does not work in countries presently experiencing enforced disappearance. Those affected here include, for example, the many migrants from Central America who are victims of enforced disappearance in Mexico. As a result, family members are often alone in their search for their disappeared relatives.

Prosecute perpetrators and search for victims

Two factors are crucial in cases of enforced disappearance: the search for the victims and bringing to light the truth of the crime, as well as the criminal prosecution of the perpetrators. In practice, these two elements are not automatically interrelated. The successful prosecution of the perpetrators is essential in preventing further crimes. Since such investigations concentrate on establishing the perpetrators, identifying individual victims – i. e. by exhuming remains – is not necessarily a factor in this kind of investigation. For example, the Peruvian state prosecutor's office primarily dealt with enforced disappearance during the violent conflict (1980–2000) by means of penalties under criminal law. It was not until 2016 that the government passed a law with a programme of measures codifying the right of the surviving families to the truth. This law also provides for the search for, exhumation and identification of those disappeared and stipulates the participation of family members in the search, their access to information, psychosocial care and further measures.¹¹ In the legal process of coming to terms with the crimes committed under the dictatorship in Argentina, although only a few of the persons disappeared could be identified (among other reasons, because the victims were thrown into the sea on the so-called 'death flights'), the criminal prosecutions and court proceedings nonetheless provided important knowledge about the victims, the course of events, and the perpetrator structures. Here, coming to terms with the past through the application of criminal law did lead to implementing the fundamental rights of victims to the truth – and, as a result, to redress.¹²

The Argentinian experience shows that besides persecuting the perpetrators for their crimes, it is also possible to clarify the events, uncovering the structures underlying the crimes, their intellectual architects and perpetrators. The search for perpetrators can be connected to the search for the victims, disappeared and surviving, and their right to the truth.

The situation is different in the countries in the Western Balkans where the governments have concluded agreements especially emphasising the humanitarian aspects – namely, the search for and identification of the victims and returning the remains to the bereaved. In the wake of these agreements, 80 per cent of those disappeared have been identified – around ten times as many as in Argentina. Admittedly, this humanitarian search has to be supplemented by clarifying what befell the victims of enforced disappearance, where they were detained or abducted, where they were then taken, and what happened to them.

Experts point out that searching for disappeared persons and the process of clarification through prosecuting the crime of their enforced disappearance must be complementary measures. The overriding objective of all investigations must be the maximum clarification possible, enabling the victims and the societies affected to come to terms with their traumatisations.

Guidelines for searching for the dead and their identification

Very different approaches are taken to searching for and identifying people who disappeared a long time ago. Many countries affected have set up dedicated institutions for searching and clarifying cases. For instance, Truth Commissions, as they are known, in Timor-Leste, Paraguay, Chile, Spain and Morocco have confronted and dealt with the crimes of the past, while Peru and Mexico have created special prosecutors' offices to investigate disappeared persons. The work of such institutions was rarely effective – either because the countries lacked the political will to throw light on and resolve these crimes, or because the enforced disappearances occurred too long ago.

Since the 1990s, though, advances in the technological means available have substantially expanded the possibilities of identifying victims through such methods as analysing skeletal remains or DNA. Nonetheless, despite this technological progress, attempts to identify human remains are often unsuccessful. This is primarily due to the failure to apply scientific standards in the work. Since 1999 in Kosovo, for example, several teams have searched for mass graves and conducted

exhumations, but without taking a unified approach. The exhumations were not planned jointly, nor were the data collected subject to the same scientific standards. Further data, such as pieces of clothing, were not recorded in gathering the pertinent information, findings were not documented, and the various teams did not exchange information. Neither the forensic teams nor other institutions informed the family members of the results of their research or compared the processed data. In some cases, even without identification, the exhumed human remains were buried at an unknown location for a second time.¹³

For this reason, the International Red Cross has drafted standards for the search for and identification of disappeared persons, publishing the first guidelines in 2003.¹⁴ The guidelines are intended to support state and other actors in the use of scientific standards in establishing the location of disappeared persons, implementing search measures and, if necessary, applying methods of identification. On the basis of the experiences in Kosovo outlined above, experts in the field have published recommendations for the search for disappeared persons in Iraq. These recommendations stress the importance of non-governmental and central institutions with a clear mandate and following humanitarian principles. The identification of victims must be the overriding priority.¹⁵

Guidelines for searching and identifying persons recently disappeared

Having clear guidelines available for searching for people recently disappeared plays a decisive role in the success of such searches. In addition, there must be institutions responsible for the search. Crucially, as detailed above, the search needs to take place quickly, with the investigating authorities beginning the search for the victim immediately and assuming that the person looked for is alive until found. International norms prescribe that the responsible authorities are granted access to those places where persons may be held such as, for example, prisons, police stations, hospitals or psychiatric institutions. However, this is very far from sufficient. Columbia as well as Mexico have dedicated laws, state guidelines and institutions for the search for disappeared persons. In addition, both countries

have a missing persons register. In practice, these instruments do not really work due to a lack of financial and technical resources as well as expertise, and so permanent monitoring is impossible.

Against this background, it is important to have supplementary international instruments and measures for the urgent search for disappeared persons.

Urgent actions on the UN level

On the international level, the urgent actions, as they are known, of the UN Working Group and the UN Committee on Enforced Disappearances are their most important instrument in the search for victims of enforced disappearance, and used especially intensively by family members searching for a disappeared relative.

People from all countries can turn to the UN Working Group for assistance, which acts under the mandate granted by the Declaration on the Protection of All Persons from Enforced Disappearance from 1992. This Declaration, however, is not legally binding. An urgent action of the UN Working Group on Enforced Disappearances can be sought by all persons, whether or not they live in a state that has ratified the International Convention and so is obliged to take measures against enforced disappearances. In a survey of their urgent actions, the UN Working Group estimates that around 25 per cent of all urgent actions are successful, i.e. the disappeared person could be found alive.¹⁶ At its last session in May 2017 alone, the UN Working Group received 65 urgent action requests from Egypt, Bahrain, China, Malaysia, Pakistan, Palestine, Sudan, Syria, Turkey, Turkmenistan and Venezuela.¹⁷

The UN Committee on Enforced Disappearances monitors the International Convention as a Treaty Body. The Convention has a legally binding effect on the State Parties. The UN Committee on Enforced Disappearances also has the international instrument of urgent action. On the basis of Article 30 of the Convention, in case of urgent actions the UN Committee transmits this information to the State Party concerned, calling upon it to search for the person disappeared without delay. The UN Committee can only transmit requests for urgent action to those State Parties that signed the Convention. The Committee follows the process of the urgent action until the person concerned is found. The procedure of submitting a request to the UN Committee is strongly victim-oriented and the hurdles are kept to a minimum, allowing all those with a “legitimate interest” to submit a request for urgent action. In contrast to other UN treaty committees, domestic legal remedies do not have to be exhausted before a request is made to the UN Committee on Enforced Disappearances. As a result of an urgent action, the UN Committee regularly requests information on the type and extent of the investigations on finding the person sought, and if necessary calls on the State Party to put protective measures into place for family members or witnesses. In 2016, the Committee issued a total of 85 urgent actions, primarily from Mexico, followed by Iraq. At present, five persons have been found alive, and three found dead.

Yet as important and relevant as these two instruments are, they are still only supplementary to national mechanisms for searching for disappeared persons. After all, the search for victims of enforced disappearance is first and foremost the duty of the state in question.

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